

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of:

CHARLES GREGORY,

Petitioner

HUDOA No.: 12-M-CH-PP32

Claim No.: 721004146

Date: May 30, 2012

DECISION AND ORDER

Petitioner was notified that, pursuant to 31 U.S.C. §§ 3716 and 3720A, the Secretary of the U.S. Department of Housing and Urban Development (“HUD”) intended to seek administrative offset of any federal payments due Petitioner in order to satisfy Petitioner’s alleged debt to HUD.

Petitioner requested a hearing concerning the existence, amount or enforceability of the alleged debt. The Office of Hearings and Appeals has been designated to conduct a hearing to determine whether the debt is legally enforceable. 24 C.F.R. § 17.69(c). As a result of Petitioner’s hearing request, referral of the debt to the U.S. Department of the Treasury for administrative offset was temporarily stayed by this Office on March 7, 2012, until the issuance of a written decision by the Administrative Judge. 24 C.F.R. § 17.77.

Background

On or about December 29, 2005, the FHA-insured loan on Petitioner’s home was in default and Petitioner was faced with the threat of foreclosure. (Secretary’s Statement (“Sec’y Stat.”), filed March 15, 2012, ¶ 3; Declaration of Gary Sautter, Acting Director, Asset Recovery Division, HUD Financial Operations Center (“Sautter Decl.”), dated March 14, 2012, ¶ 4.) In order to prevent the lender from foreclosing on the home, HUD advanced funds to Petitioner’s lender to bring the primary note current. (Sec’y Stat. ¶ 3.) In exchange for foreclosure relief, Petitioner executed a Subordinate Note (“Note”) in favor of HUD. (*Id.*) The amount borrowed under the Note was \$5,355.12. (*Id.* at ¶ 4.)

The Note provides that it becomes due and payable when “(i) Borrower has paid in full all amounts due under the Primary Note and related mortgage, deed of trust or similar Security Instruments insured by the Secretary....” (*See* Sec’y Stat. ¶ 4; Subordinate Note ¶ 4(A)(i).) On or about December 29, 2006, the FHA insurance on Petitioner’s primary note was terminated when Petitioner’s primary lender notified HUD that the primary note had been paid in full. (Sec’y Stat.

¶ 5.) At that time, the amount borrowed under the Note became due and payable. (See Subordinate Note ¶ 4(A)(i).) Pursuant to the Note, Petitioner was to make payments at the "Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410 or any other such place as Lender may designate in writing by notice to Borrower." (Subordinate Note ¶ 4(B).)

The Secretary has made efforts to collect this debt from Petitioner, but Petitioner remains delinquent. (Sec'y Stat. ¶ 7.) Petitioner is justly indebted to the Secretary in the following amounts:

- (a) \$5,355.12 as the unpaid principal as of February 29, 2012;
- (b) \$1,035.30 as the unpaid interest on the principal balance at 4% per annum through February 29, 2012;
- (c) \$316.70 as the unpaid penalties and administrative costs through February 29, 2012; and
- (d) interest on said principal balance from March 1, 2012 at 4% per annum until paid.

(Sautter Decl. ¶ 5.)

On August 13, 2007 a Notice of Intent to Collect by Treasury Offset was sent to Petitioner. (Sec'y Stat. ¶ 9.)

Discussion

The Deficit Reduction Act of 1984, 31 U.S.C. § 3720A, provides federal agencies with the remedy of administrative offset of federal payments for the collection of debts owed to the United States Government. In these cases, Petitioners bear the initial burden of submitting evidence to prove that the debt is not past-due or legally enforceable. 24 C.F.R. § 17.69(b); *Juan Velazquez*, HUDBCA No. 02-C-CH-CC049 (September 25, 2003).

On or about February 21, 2012, this Court received a letter from Petitioner requesting an out of time review of his debt. (Petitioners' Hearing Request ("Pet'rs' Hearing Req."), dated February 21, 2012.) In response, this Court issued a Notice of Docketing, Order, and Stay of Referral ("Order") ordering the Secretary to file documentary evidence proving that Petitioner's alleged debt to HUD is enforceable and past due. (Notice of Docketing, Order, and Stay of Referral, dated March 7, 2012.) On March 15, 2012, the Secretary filed a Motion to Dismiss, in addition to a brief, seeking to establish the existence and delinquency of Petitioner's debt to HUD. (Sec'y Motion to Dismiss, filed March 15, 2012; Sec'y Stat., filed March 15, 2012.)

On March 20, 2012, this Court ordered Petitioner to file a response to the Secretary's Motion to Dismiss setting forth evidence demonstrating "good cause" for failing to comply with the provisions of 24 C.F.R. §17.69(b).¹ (Order, dated March 20, 2012.) The Order further stated that "[f]ailure to comply with this Order may result in...a ruling in favor of the opposing party, a decision based on the record of these proceedings, or other sanctions as appropriate. (*Id.*)

¹ At the time of the Order, 24 C.F.R. §17.69(b) was designated as 24 C.F.R. §17.152(b).

On April 17, 2012, this Court received Petitioner's response to the March 20, 2012 Order. (Pet'r Resp., dated April 9, 2012.) Petitioner's response set forth several reasons as to why he felt the debt was unenforceable. (*Id.*) While this Court found that Petitioner failed to offer an explanation for his failure to timely act on the August 13, 2007 Notice of Intent, the Secretary's Motion to Dismiss was nevertheless denied due to the Secretary's representation to Petitioner that he could file an out of time appeal. (Ruling and Order on Sec'y Motion to Dismiss, dated May 9, 2012.) Again, Petitioner was ordered to file documentary evidence to prove that the alleged debt was not legally enforceable or not past due. (*Id.*)

On May 21, 2012, this Court received a response from Petitioner to the May 9, 2012 Ruling and Order. Petitioner sets forth two reasons as to why he believes he does not owe the debt. First, Petitioner asserts that he is not responsible for the debt because "HUD FAILED to collect their part of the money when the house was in Foreclosure [sic]." ((Pet'r's Second Resp., dated May 14, 2012) (emphasis in original).) Petitioner, however, presents no documentary evidence that the property was ever foreclosed upon or that HUD ever received any payment from a foreclosure sale or any other source. Assertions without evidence are not sufficient to show that the debt claimed by the Secretary is not past due or legally enforceable. *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996). Moreover, even if Petitioner had filed evidence that the property in question had been foreclosed on, this assertion would still be without merit. The Note Petitioner executed in favor of HUD was a separate instrument and secondary to the primary note held by Petitioner. "If satisfaction of a senior deed of trust through a foreclosure sale prevents a junior trust holder from enforcing a junior trust deed on the same real property, the junior trust holder may collect the debt, now unsecured, by initiating collection efforts based on the obligations in the loan note." *John Bilotta*, HUDBCA No. 99-A-CH-Y258 (December 29, 1999) (citing *Kimberly S. (King) Thede*, HUDBCA No. 89-4587-L74 (April 23, 1990)). Thus, even if the primary lender foreclosed upon the property in question, the Secretary would still be entitled to separately enforce the debt against Petitioner under the terms of the secondary note.

Assuming the primary lender did foreclose on the property in question, California's antideficiency statute would be of no avail to Petitioner. Generally, deficiency judgments are unavailable after a trustee or mortgagee's sale of property under a deed of trust. Cal. Civ. Proc. Code § 580d (West 2012). However, the California Supreme Court has recognized an exception when two deeds of trust are held against a single property and the senior lienor nonjudicially forecloses on the property. *See Bank of America v. Mitchell*, 204 Cal. App. 4th 1199 (2012) (citing *Roseleaf Corp. v. Chierighino*, 378 P.2d 97 (Cal. 1963)). In *Roseleaf*, the California Supreme Court found that section 580d does not extend to a junior lienor who has been sold out in a senior sale. *Roseleaf Corp.*, 378 P.2d at 102. In this case, the holder of Petitioner's primary mortgage was the senior lienor and HUD was the junior lienor. Thus, if the senior lienor did in fact foreclose on Petitioner's property, HUD would be left without a remedy if it were bound by section 580d because its security would now be valueless.² This result would frustrate the purpose of the antideficiency statute rather than advance it. *See id.* at 101-02.

² Section 580b of the California Code of Civil Procedure provides that a deficiency judgment shall not lie after a sale of real property if the note constitutes "purchase money." Cal. Civ. Proc. Code § 580b (West 2012). In this case, Petitioner had already purchased the property when HUD advanced the funds to the primary lender. Thus, the payment cannot be viewed as purchase money. Accordingly, section 580b is inapplicable here.

Second, Petitioner claims that he filed a quit claim deed with Riverside County, California and that a "new bank" purchased the property, thereby absolving Petitioner of all liabilities in connection with the property. (Pet'r's Second Resp.) This argument is also without merit. Even assuming that a bank did purchase the property in question and agreed to assume all liabilities in connection therewith, there is no evidence that Petitioner was released from his obligation on the Note executed in favor HUD. HUD would have had to have given Petitioner a written release, or other documentary evidence, indicating an intent to release, supported by legally sufficient consideration. *See William Holland*, HUDBCA No. 00-A-NY-AA83 (October 12, 2000) (citing *Ann Zamir (Schultz)*, HUDBCA No. 99-A-NY-Y155 (October 4, 1999)). The record contains no such evidence. Thus, absent a written release or novation, Petitioner remains liable on the note even if he did in fact quit claim the property to a third party. *See Valerie L. Karpanai*, HUDBCA No. 87-2518-H51 (January 27, 1988).

In sum, Petitioner has failed to prove that the debt is not past due or legally enforceable. The Secretary is therefore entitled to collect the debt via administrative offset.

ORDER

For the reasons set forth above, I find the debt that is the subject of this proceeding to be legally enforceable against Petitioner in the amount claimed by the Secretary. The Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative offset is **VACATED**. It is hereby

ORDERED that the Secretary is authorized to refer this matter to the U.S. Department of the Treasury for administrative offset of any federal payment due Petitioner.



H. Alexander Manuel
Administrative Judge

May 30, 2012